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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1967

No. 784

IN THE MATTER OF THE WOODMAR REALTY COMPANY, a Corporation,
Debtor,

* * * * *

~~CITY OF HAMMOND, INDIANA, a Municipal Corporation,~~ and WOODMAR REALTY COMPANY, an Indiana Corporation,
Petitioners,

vs.

WALTER A. McLEAN, TRUSTEE,
Respondent.

} In Proceedings for the Reorganization of a Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT WOODMAR REALTY COMPANY, PETITIONER.

RESPONDENT'S BRIEF IN OPPOSITION.

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RESPONDENT'S BRIEF IN OPPOSITION.

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

In July 1965, Walter A. McLean, Trustee in bankruptcy for Woodmar Realty Company, a corporation, filed in the

United States District Court, for the Northern District of Indiana, Hammond Division, a Trustee's Supplemental Final Report, alleging in substance that all pending claims in this bankruptcy matter had been acted upon by the court and that the time for appeal from such action had long since passed,—and then praying for authority to make distribution on the claims as allowed in the amounts set out in such report.

At the same time the Trustee and Trustee's counsel filed petitions for the allowance of fees and expenses.

Hearing was had on such report and petitions in the District Court on October 22, 1965. At that time the bankrupt, Woodmar Realty Company and the City of Hammond, a lien claimant, both filed objections to the Trustee's Supplemental Final Report and to each of the fee petitions. On January 19, 1966, the District Court Judge, Robert E. Tehan, of Milwaukee, Wisconsin, on special assignment in the District Court for the Northern District of Indiana, handed down an opinion denying the objections of Woodmar Realty Company and the City of Hammond and in such opinion ordered the approval of the Trustee's Supplemental Final Report and the making of distribution to the creditors as prayed for in the Report. In such opinion the District Court likewise determined the amount of the allowance of fees and expenses for the trustee and trustee's counsel. The opinion of January 19, 1966 is attached as "Appendix C" at page 15-a to the petition now before this court.

Thereafter, on February 10, 1966, the District Court entered a judgment in conformity to such opinion and such judgment is set out as Appendix "B" at page 9-a to 14-a in the Appendix filed with this petition.

Thereafter, both Woodmar Realty Company and the City of Hammond appealed to the Court of Appeals—7th Circuit—and the Court of Appeals affirmed, on June 22, 1967, the opinion of the District Court. The opinion of the Court of Appeals is set out as Appendix "A" at page 1-a to 8-a in the Appendix attached to this petition.

The respondent believes that in order that there be a proper understanding of the matter now before this court, —that this court should know that the Woodmar bankruptcy matter has been pending in the District Court for the Northern District of Indiana, since January 1941; that since 1955 the matter has been in constant litigation; that Woodmar Realty Company has, since 1955, prosecuted nine appeals from the orders of the District Court to the Court of Appeals; that eight of such appeals have been taken from the rulings of the present presiding Judge, Robert E. Tehan, on special assignment to the Northern District of Indiana; that the last six appeals have been heard and passed upon in the Circuit Court of Appeals by the same panel of judges, to-wit: Circuit Court Judge Knoch, Circuit Court Judge Castle and Circuit Court Judge Kiley, and that in all of the six appeals, the Court of Appeals has affirmed the judgments of the District Court.

It should also be pointed out that on two prior occasions, —first in 1961, and again in 1965—Woodmar Realty Company sought relief in this court by filing petitions for writs of certiorari. Both of such petitions were denied.

If the writ of certiorari is denied to the petitioners at this time, the trustee will then be enabled to proceed with distribution so that this bankruptcy matter, pending for more than 26 years in the District Court, can be in all things completed.

OPINIONS BELOW.

The Court of Appeals on June 22, 1967, affirmed the order of the District Court. A copy of the Court of Appeals opinion is set out at pages 1-a to 8-a, Appendix "A" attached to the petition.

The District Court order appealed from to the Court of Appeals is set out at Appendix "B" at page 9-a of the Appendix, and the District Court's opinion approving the Trustee's Supplemental Final Report and ordering distribution is set out in Appendix "C" at page 15-a of the Appendix.

JURISDICTION.

The judgment of the Circuit Court of Appeals sought to be reviewed in this matter is dated June 22, 1967. On September 20, 1967, on the 90th day allowed for the filing of a petition for certiorari—the City of Hammond filed a petition for an extension of time for the filing of such a petition. The petition for extension was granted.

Woodmar Realty Company did not file a petition for an extension of time and did not file a petition for certiorari within 90 days from the date of the judgment sought to be reviewed.

The jurisdiction of this court to rule on petitions for certiorari is found in 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

The petitioner contends that the following questions are presented for review:

(1) Whether or not the Court of Appeals erred in approving the District Court's use of the "motion for summary judgment" concept as a means and method of avoiding any hearings on lien claims against the Woodmar Realty Company's assets.

(2) Whether or not the Court of Appeals erred in approving the District Court's abuse of discretion under Rule 16 of the Federal Rules of Civil Procedure in ordering the Woodmar Realty Company to file "statements in connection with lien claims".

(3) Whether or not the Court of Appeals erred in approving a form of trustee's report which prays for "allocations" in favor of lien claimants without regard to lack of proof of either the existence of the lien claims or the amounts, if any, which they may have coming out of the assets.

(4) Whether or not the Court of Appeals erred in approving the allowance of trustee's fees and trustee's attorney's fees in amounts approximating $130,000.00.

CONSTITUTIONAL RULES, PROVISIONS, ETC. INVOLVED.

Rule 56 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> Rule 56. Summary Judgment.
>
> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended December 27, 1946, effective March 19, 1948.
>
> (b) For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (28 USCA, Rule 56, page 302)

Rule 16 of the Federal Rules of Civil Procedure provides in pertinent part:

> Rule 16. Pre-Trial Procedure; Formulating Issues.
>
> In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
>
> (1) The simplification of the issues;
>
> (2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

(28 USCA, Rule 16, page 591)

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which

constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended December 27, 1946, effective March 19, 1948.

(28 USCA, Rule 52(a), p. 14)

CONCISE STATEMENT OF THE CASE.

In January 1941, an involuntary petition was filed under Chapter 10 of the Bankruptcy Act in the United States District Court for the Northern District of Indiana against Woodmar Realty Company. The record shows that this corporation, at the time of the filing of the petition, had been a dormant and inactive corporation for more than ten years. It was organized for the subdividing and sale of vacant lots and its only asset was 1540 vacant lots and 12 unsubdivided blocks of residential property in Hammond, Indiana. This real estate was encumbered by substantial general property taxes, a delinquent first mortgage of in excess of $300,000.00—and special improvement liens under some 50 special improvement resolutions issued under the authority of the City of Hammond. Under the Indiana Barrett Law—all of such special improvement resolutions provided for the issuance and sale of special improvement bonds, which bonds were payable over a period of ten years. In January 1941, all of such special improvement liens were unpaid and delinquent (the principal sum of the unpaid improvements was approximately $477,000.00), and 49 different special improvement rolls were in foreclosure in the county courts of Lake County, Indiana.

The real estate taxes and the mortgage indebtedness were compromised and settled in 1941, leaving as the only remaining indebtedness the unpaid special assessment litigation under the 50 rolls heretofore described.

The Woodmar Realty Company filed an answer in the Chapter 10 proceedings in the District Court admitting

its insolvency and consenting to the adjudication. Due to the shortage of building materials during World War II, no residential building was possible in the next few years and the corporate reorganization proceedings moved forward at a slow pace. In the years from 1946 to 1951 it became apparent that corporate reorganization was not the answer and that liquidation of the corporation was advisable. In these years,—proceeding under orders of the District Court—the trustee sold all of the different parcels of real estate—"free and clear of encumbrances" with the funds received from such sales being then impressed with the lien of the special improvement liens then existing on the different parcels of the property sold.

In May 1951 all of the vacant land had been sold by the trustee. In February 1953, after lengthy hearings in the District Court, it was decided that corporate reorganization was not feasible and Woodmar Realty Company was then placed in a straight bankruptcy, in accordance with the provisions of Section 236(2) of the Bankruptcy Act.

The special improvement bonds issued under the 50 improvement resolutions had been widely sold. In the years in corporate reorganization, more than 250 claims had been filed by bondholders in the proceedings, and after 1953 many additional claims were filed on these improvement bonds in the straight bankruptcy action.

In the years from 1953 to 1955 the District Court on the trustee's petition authorized the employment of a certified public accountant for an auditing study so that the amounts received on the sale of the bankrupt's real estate could be applied properly to the payment of the lien indebtedness on the property sold as represented by

the different special assessment bonds and coupons—shown as unpaid on the books and records of the City of Hammond.

As a result of the findings of this auditing study and the trustee's examination and work on all of the lien claims—the trustee, in September 1955 filed a report in the District Court alleging that he had studied and examined all of the pending lien claims, and then in such report the trustee recommended to the court the allowance of 313 lien claims filed by the holders of unpaid special assessment improvement bonds. In such report, the trustee further alleged that through the auditing study—the total unpaid special assessment bond liability had been determined on each roll and that likewise, the amount of the cash allocation due to each special assessment bond and coupon had been determined and in such report the trustee recommended an allocation of cash to each unpaid bond and coupon in the amount established by the auditing study.

Thereafter, in 1958, the trustee filed an amended final report again alleging and recommending an allocation of cash to each unpaid special improvement bond and coupon in an amount as fixed by the auditing study and recommended the allowance and payment of some 313 claims—all as previously alleged in his report filed in September 1955.

After the filing of the trustee's report in September 1955, the bankrupt appeared in the bankruptcy proceedings through its counsel and filed objections to virtually all of the lien claims. The trustee moved to strike out such objections on the theory that the bankrupt—being insolvent—was not a party in interest. The District Court

sustained the trustee's motion, but this action was reversed in the court of appeals. The court of appeals held that inasmuch as the disallowance of all the claims would result in there being no indebtedness against the bankrupt held that Woodmar Realty Company was a party in interest to object to these special assessment liens. *In re: Woodmar Realty Company,* CCA 7th Cir. 1957, 241 F. 2d 768.

At the time of the reversal of this appeal (March 1957) there were 313 claims then pending in the District Court and Woodmar Realty Company had filed objections to virtually all of such claims. In its brief in the court of appeals, Woodmar Realty Company alleged that all of the claims on special improvement bonds and its objections thereto raised the same factual and legal problems.

In June 1957 a pretrial conference was held which was attended by Woodmar Realty Company and representative lien claimants. Woodmar Realty Company reported that the following steps were agreed to:

> "By agreement of all parties in interest, who attended the pretrial conference at Lafayette on June 28, 1957, Claim 441 was tried as a 'test' or 'pilot' claim for the purpose of establishing general rules of law by judicial decision applicable to the 313 claims listed in the Trustee's Amended Final Report."

The record shows that Woodmar Realty Company filed 15 objections to Claim 441. This "test" or "pilot" claim was tried by the court and the court found that the bankrupt's 15 objections to such claim were entirely without merit. The Woodmar Realty Company appealed this test case to the Court of Appeals and the District Court's order allowing Claim 441 and denying the bankrupt's

objections was affirmed. *In re*: *Woodmar Realty Company*, CCA 7th Cir. 1961, 307 F. 2d 591.

Immediately after the ruling on the test claim 441—the trustee filed a motion for summary judgment asking that the District Court determine (1) that Claim 441 was tried as a test case to determine the validity of the bankrupt's objections to all lien claims, (2) that on the basis of the court's judgment on Claim 441—that the objections to all lien claims were without merit, and (3) that there are no valid objections on file to any of the lien claims, and that (4) the bankrupt is not a party in interest.

The objections filed by the bankrupt to the lien claims raised two specific defenses; (1) that the claims on special assessment bonds and coupons were barred by the Indiana Statute of Limitations, (2) that such claims had been merged in judgments taken in foreclosure actions in the state courts, and then it was contended that there were other evidentiary matters involving the other claims which would make the court's decision on Claim 441 inoperative and ineffective as to the other claims.

The trustee contended in its motion for summary judgment that the facts already established in the record—in this long pending matter,—brought each claim within the ruling on Claim 441 and that there was in truth no genuine issue of material fact as to any of the other claims, and that the only question as to such claims was a question of law.

On November 29, 1962, the District Court, acting under Rule 16 Federal Rules of Civil Procedure—relating to pretrial procedure, in an effort to determine whether there existed with respect to the question of validity of the bankrupt's objections to the remaining lien claims—any genuine issue of material fact—entered an order re-

quiring that the bankrupt, Woodmar Realty Company, should file not later than January 11, 1963, a statement as to each pending claim, containing the following information:

A. If the objections filed are based upon the Statute of Limitations, then the bankrupt will set forth:

1 to 4. In substance as to how and in what manner the claim is barred by the Statute of Limitations, and how and in what manner the ruling on such claim should not be governed by the decision on Claim 441.

B. If objections have been filed by the bankrupt alleging that the claim was merged in a final judgment in a foreclosure action—then the bankrupt will set forth in substance as to how and in what manner such merger has taken place, and how and in what manner the allowance of the claim should be affected.

C. If the bankrupt contends that there are any other facts which differentiate any claim from Claim 441, then the bankrupt will state with specificity the manner in which such claim and the objections thereto—make it different from Claim 441 and require a different adjudication.

D. In its opinion of July 21, 1961, the court has described the proper method of computing the amount due on bonds—out of this estate. Using such method, the bankrupt will state as to each claim the amount it believes should be recovered by the claimant if the claim is held to be valid.

It is further ordered that if the bankrupt fails to furnish the information required in paragraphs A, B

and C as above directed, it will be deemed to have admitted,—with respect to each claim—where such failure occurs, that the claim is valid under the law as established on Claim 441 and that such claim can not be differentiated from that claim.

If it fails to furnish the information required in paragraph "D" above, as directed, as to any claim, it will be deemed to have admitted that the trustee has properly arrived at the amount of that claim in his amended final report.

The bankrupt then, in accordance with such order, filed responses to some 151 of the pending claims.

The District Court order of November 29, 1962, is set out in pages 488 to 490 in the Appellant's Appendix in Cause Nos. 15694 and 15695, United States Court of Appeals,—which Appendix is now a part of the record in this court.

After the filing of the responses by the bankrupt, the District Court judge examined each of the remaining 304 pending lien claims in the light of the responses as filed,—the objections on file to each claim, and then, in two voluminous and detailed orders of May 20, 1963 and September 23, 1963—held in effect as to these pending lien claims that the bankrupt's objections to such claims were governed by the court's decision and judgment on Claim 441; that the bankrupt's objections to such claims were without merit and that there was in fact no genuine issue of material fact and that such claims should be allowed in the amounts recommended for allowance by the trustee in the Trustee's Amended Final Report.

The District Court's order of May 20, 1963, is set out at pages 458-500 in the Appellant's Appendix in Cause Nos. 15694 and 15695, United States Court of Appeals, which Appendix is now a part of the record in this court on this matter.

The District Court's order of September 20, 1963, is set out at pages 500 to 556 in the Appellant's Appendix in Cause Nos. 15694 and 15695, United States Court of Appeals,—which Appendix is now a part of the record in this court.

In its order of September 23, 1963, in passing upon the lien claims and the validity of the bankrupt's objections thereto, said as follows:

> "The bankrupt, having failed to show that any Class II claim (lien claim) recommended for allowance by the trustee must be disallowed after having been given full opportunity to do so, is no longer a party in interest."

On the same day the District Court entered the following judgment:

> "It is Ordered that the bankrupt, Woodmar Realty Company, is not a party in interest within the meaning of Section 57(d) of the Bankruptcy Act and has no standing in this proceedings." Appellant's Appendix, Cause No. 15694, 15695, page 557.

In July 1965 the trustee filed his Supplemental Final Report and the trustee and trustee's counsel filed fee petitions for the allowances of fees and expenses. The trustee's report traced in great detail the history and the many steps taken in the administration of this bankruptcy over a period, since his appointment, of eleven years. Such report then alleged that all pending claims had been allowed by court order and that the time for

appeal from the allowance of such claims had long since passed.

The trustee likewise alleged that the amount of the allowance of each claim had been fixed and determined and that there was no pending claim or objections to a claim awaiting decision. The trustee in his report then prayed that the fee allowances of the trustee and trustee's counsel be fixed and determined—and that he then be authorized to make distribution to the claims as allowed, and that this bankruptcy administration then be closed.

Hearing was had on October 22, 1965. The bankrupt, Woodmar Realty Company, filed objections to the trustee's final report and the City of Hammond, a lien claimant, likewise filed objections to such report.

On January 19, 1966, the District Court handed down its opinion on such hearing and such opinion is now set out on page 15-a, as Appendix "C" on the petition filed in this matter by the City of Hammond.

The United States District Court thereafter in an order on February 10, 1966, based upon its opinion of January 19, 1966, denied the objections filed by Woodmar Realty Company and the objections filed by the City of Hammond, and approved the trustee's final report and fixed and determined the fees and expenses to be allowed to the trustee and trustee's counsel. A copy of such order is attached as Appendix "B" to the petition.

Thereafter, both Woodmar Realty Company and the City of Hammond appealed to the Court of Appeals and on June 22, 1967, the Court of Appeals affirmed the judgment of the District Court. The judgment of the Court of Appeals is attached as Appendix "A" to the petition.

ARGUMENT.

I.

The briefs filed by Woodmar Realty Company in its appeal to the Court of Appeals are now a part of the record in this court. The "Argument" part of the appellant's brief is found at pages 39 to 67 of that brief. At pages 22 to 45 incl., in the petition for certiorari—Woodmar Realty Company, under the heading of "Argument" sets forth its alleged argument for the granting of certiorari in this proceedings.

A careful study and examination of these pages of "Argument", and a comparison of the argument set out in Woodmar's briefs on appeal in the Court of Appeals—shows that the alleged "Argument" in the petition for review is an exact copy, word for word, of paragraphs II and V, incl., of the Argument in the brief on appeal.

For example, Paragraph I, at pages 22 to 32 in the Petition for Certiorari is exactly the same as Paragraph II at pages 45 to 55 in the brief on appeal.

That likewise, Paragraph II of "Argument" in the petition, at pages 32 to 37, is a copy verbatim of Paragraph III at pages 45 to 55 in the brief on appeal.

That likewise, Paragraph II of "Argument" in the petition, at pages 32 to 37, is a copy verbatim of Paragraph III at pages 55 to 60 of Argument set out in Woodmar's brief on appeal. The same thing is true of Paragraph III of the alleged "Argument" found on pages 37 to 42 in the petition. The petitioner, Woodmar Realty Company, has copied this section of its "Argument"

word for word, and citation for citation—as set out in Paragraph IV, pages 60 to 64, of appellant's brief.

In addition, Paragraph IV of the Argument in the petition for review, at pages 42 to 44, constitutes duplication of Paragraph V included in Woodmar's brief on appeal.

These four paragraphs, I to IV incl., constitute the complete "Argument" set out in the petition for certiorari filed by Woodmar Realty Company. In other words, this petition for review sets out no new argument citing its reasons for review by this court.

The Respondent believes that this duplication of argument, presenting now as reasons for review by certiorari —the same exact argument as advanced on appeal—is an argument for two different types of relief and is not a good faith presentation of a petition for review. Respondent believes—in keeping with Rules 19 and 23 of the Supreme Court—that such a presentation is not in keeping with the type of presentation of reasons for review required in such rules and that such duplication of argument should not be considered by this court.

II.

A.

In its petition for review and on its appeal to the Court of Appeals—Woodmar Realty Company contended that the trustee's motion for summary judgment was unauthorized under the rules—that it should have been stricken from the record on the bankrupt's motion and that it should not have been granted.

As alleged in the Concise Statement of Facts, some 304 lien claims were filed in this proceedings. The bankrupt objected to virtually all of such claims. The claims and objections thereto involved the same factual legal problems. By agreement of all parties—one claim, Claim 441—was tried by the court as a "test claim" to establish by legal decision basic rules of law applicable to all of the remaining 304 claims. Claim 441 was tried as a "test case". Finding was entered for the claimant and that all of the bankrupt's objections to such claim were held to be without merit. The District Court's decision on this "test claim" was then affirmed on appeal.

Thereafter, the trustee filed a motion for summary judgment seeking a determination that Claim 441 was tried as a "test case" and that the court's decision on such claim—that the bankrupt's objections to such "test claim" were without merit—in effect was a decision that the bankrupt's objections to all other lien claims were likewise invalid.

Shortly thereafter, the District Court, without ruling on the trustee's motion for summary judgment—and proceeding under Rule 16—the pretrial procedure—entered an order on November 29, 1962 requiring that the bankrupt set forth in substance how and in what manner (1) the defense of the Statute of Limitations barred recovery on the other lien claims, and (2) how and in what manner the bankrupt's objection of merger in judgment applied to the claims other than Claim 441, and (3) how and in what manner there were other factual situations applying to claims other than Claim 441 which differentiated such other claims from Claim 441, and made the court's decision on Claim 441 ineffective to determine the legal and factual decision on other claims.

Such order further provided that the bankrupt, using a formula established in the proceedings in Claim 441, should compute the amount to be due on each outstanding lien claim—if such claim was to be allowed.

This portion of the pretrial order further provided that if the bankrupt did not compute the amount to be allowed on each claim—then such failure on the part of the bankrupt would constitute an admission that the amount alleged by the trustee as being due on such claim in his amended report was correct.

The bankrupt then filed partial responses on some 151 pending claims. Thereafter, the District Court, in the light of the bankrupt's responses on all lien claims, and in the further light of the record on the "test claim 441" —studied and examined each of the 304 pending lien claims. Thereafter, in two detailed and voluminous orders, on May 20, 1963, and on September 23, 1963, the District Court reviewed its examination and study of all of the pending lien claims and then determined that there was no genuine issue of material fact as to any of the pending lien claims differentiating such claims from the "test claim 441", and then further determined that such lien claims should be allowed in the amount recommended for allowance in the trustee's amended final report.

The District Court order of May 20, 1963, is found in the Appendix, Cause 15694 and 15695, at pages 458-500, and such Appendix is now a part of the record in this court on this proceeding.

The District Court order of September 23, 1963, is found in the Appendix in Cause 15694 and 15695 at pages 500-557 in such Appendix, and that Appendix is now a part of the record in this court on this appeal.

The important point in this regard is that the District Court, after studying the complete record in the bankruptcy matter, together with the facts developed by the bankrupt's response on the pretrial order of November 29, 1962, and after having examined each of the pending lien claims and the objections thereto filed by the bankrupt—found that as to each pending claim there was no genuine issue of fact differentiating such claim from Claim 441, and that the bankrupt's objections to the other claims —based upon the holding in the "test" claim 441, were without merit.

On this basis and after this study and examination, the District Court ordered the allowance of the then pending lien claims by separate order. Such claims were then allowed in definite amounts and no appeal was ever taken from such orders of allowance. Likewise, on September 23, 1963, the District Court having ordered the allowance of all lien claims then found as a fact that Woodmar Realty Company was not a party in interest—and then, on September 23, 1963, entered an order that Woodmar Realty Company was not a party in interest and had no standing in such proceedings.

This order is found at page 557 in the Appendix in Cause 15694 and 15695, now a part of the record in this appeal.

No appeal was taken from the allowance of the separate lien claims or from the District Court's judgment that Woodmar was not a party in interest.

B.

In its appeal to the Court of Appeals and in its petition for certiorari filed herein—Woodmar Realty Com-

pany contends that the trustee, under Rule 56 of Civil Procedure was not a proper party for the filing of such a motion. In Moore's Federal Practice, 2nd Edition, Vol. 6, pages 2182-2184, this author discusses the use of summary judgment in proceedings in bankruptcy and says as follows:

> "In proceedings and controversies arising in controversies over which the bankruptcy court has jurisdiction, the federal rules are generally applicable by virtue of General Order 37. Unless inconsistent with the Act or General Orders, Rule 56, therefore, applies and the basic principles underlying the grant or denial of summary judgment govern."

Likewise, in the following bankruptcy cases reported in bankruptcy proceedings the trustee moved for and used the summary judgment proceedings in aiding in the administration of a bankruptcy matter.

Schwartz v. *Levine & Malin, etc.*, CCA 2d 1940, Ill. F. 2d 81;

Beall v. *Pinckney*, CCA 5th Cir. 1943; 132 F. 2d 924;

In re: Yellow Transit Freight Lines, CCA 7th Cir. 1953, 207 F. 2d 602;

In re: Norwalk Tire & Rubber Co., D.C. Conn. 1950, 93 F. Supp. 870.

In each of the above cases, the only test was whether or not there was a genuine issue of fact remaining to be decided, as was the situation in the Woodmar matter.

It is important to note that the Court of Appeals did not believe it necessary to rule on this point on account of two reasons: (1) the propriety of a summary judgment by the trustee had not been raised on appeal from orders ruling on such summary judgment procedure, and (2)

because of the District Court's painstaking procedure under Rule 16 and the detailed and complete examination made by the District Court as to each pending claim, and the further fact that the court, after such examination, made a determination that there was no genuine issue of material fact to be decided as to each claim.

III.

In Paragraph II of its Argument in the petition for review of the decision of the Court of Appeals—Woodmar Realty Company complains that the court's order of November 29, 1962, was an abuse of discretion under Rule 16 of the Federal Rules of Civil Procedure.

As previously pointed out, at the time such order was made there were pending in this bankruptcy administration some 304 claims based upon special improvement liens. One lien claim—Claim 441—by agreement of all parties, including Woodmar, had been selected to be tried as a "test" claim so that rules of law applicable to all of the remaining lien claims could be established by legal decision. Such claim was tried as a "test" claim and the bankrupt's objections were held by the court to be without merit.

The bankrupt had previously reported to the court that all of the lien claims were of the same type and involved the same legal and factual problems.

After the decision on Claim 441, the trustee filed a motion for summary judgment contending in effect that the court's decision on the "test" claim was decisive of all of the lien claims and that there were no different legal or factual problems existing as to such other lien

claims, and that on the basis of the court's opinion on the "test" claim, the bankrupt's objections to all other lien claims were without merit.

The Woodmar Realty Company refused to abide by its stipulation and contended that there were differences as to the other claims not raised as to Claim 441, and different legal problems, and maintained that each of the 304 lien claims had to be tried separately in the District Court.

The trustee, prior to this time, in accordance with the trustee's duty as established in the cases of, *In re: Prather*, D.C. So. Dist. of Ill. 1956, 138 F. Supp. 433, and *Grodsky v. Sipe*, Eastern Dist. of Ill. 1941, 36 F. Supp. 244, had filed in this bankruptcy complete records of the outstanding special lien indebtedness existing as against the bankrupt's property and had likewise filed an allocation of cash to each bond and coupon in an amended trustee's report.

All of this information was available to the bankrupt. On November 29, 1962, at a pretrial conference the District Court then made the pretrial order complained of. Woodmar Realty Company, although it now complains of this order in its petition for review, does not set out such order in its Appendix. Such order is found, however, at pages 488-489 in the Appellant's Appendix in Cause 15694 and 15695, Court of Appeals, which appendix is now a part of this record in this court.

The effect of such order was that the bankrupt who had been contending that there were different factual situations as to the other lien claims and other objections to such claims not governed by the decision on the test claim, 441, —was now required to show how and in what manner the

remaining lien claims and the objections thereto differed from Claim 441.

The order further required that the bankrupt, by way of response, compute the amount which it believed should be allowed on each bond and coupon, and then provided that if the bankrupt failed to compute the amount on each bond and coupon, then such failure would constitute an admission that the amount computed and set out as an allowance on such bonds and coupons in the trustee's amended report was correct.

The District Court clearly had the right under Rule 16 to make its order of November 29, 1962. Such order called upon the bankrupt to produce the facts—the evidence—on which it claimed that there were defenses different to those presented by way of objection on Claim 441.

A like situation was presented to the court in the case of *Berger* v. *Brannam*, CCA 10th Cir. 1949, 172 F. 2d 241, where the court said:

> "Since the only issue between the parties was what material data was recorded in the appellant's petitions,—and since the appellee had alleged that his "Exhibit A" correctly reflected all pertinent data, the court was not required to stand by, permit appellant to rest on its general denial and await the outcome of a long and expensive trial to see whether such a denial was sustained. Since the appellees conceded appellant's right to credit for all such items, but claimed that it had given such credit in the preparation of "Exhibit A",—the court had the power under Rule 16 to require appellant to point out specifically what items on its books—were omitted from appellee's "Exhibit A". Appellant, having failed to do so, there was no real issue of fact in dispute,—and plaintiff's exhibit—buttressed by the affidavit of the

> person who prepared it, stated that it correctly reflected all pertinent items shown by the appellant's books,—stood unchallenged and the court properly sustained his motion for summary judgment under Rule 56."

and the order of November 29, 1962 was similar to the pretrial order made in the *Berger* case, and was not an abuse of discretion by the District Court—but was an exercise of the power granted to the court under Rule 16.

IV.

In this petition for review of the decision of the Court of Appeals—the petitioner lists the third question for review as follows:

> Whether or not the Court of Appeals erred in approving a form of trustee's report which prays for "allocations" in favor of lien claimants without regard to lack of proof of either the existence of the lien claimants or the amounts, if any, which they may have coming out of the assets.

The Respondent, of course, knows that the truth or falsity of the above listed allegation is not going to be inquired into on a consideration of this petition for certiorari. However, if the complete record of this bankruptcy is in this court, then such record will show that a great sufficiency of evidence was introduced in the bankruptcy court as to the special improvement bond liability—existing bond for bond— as unpaid liens against the bankrupt's property. This evidence went into the detail of showing each bond and coupon that was unpaid. The bankrupt, in fact, in these proceedings introduced exhibits in evidence showing that 49 different special assessment lien rolls constituted liens on the bankrupt's property.

The evidence before the District Court judge likewise involved an auditing study made by a certified public accountant employed under orders of the District Court—and such auditing study made allocations of cash to each unpaid bond and coupon, such allocations being for the share due to each bond and coupon from the net proceeds of the sale of property on which the bond and coupon presented a lien.

That evidence was before the District Court when the District Court allowed,—by separate order—more than 300 lien claims in this matter.

Any representation that claims were allowed in this matter without evidence to sustain such allowances—or charges that allowances of cash were recommended to claims without proof—are untrue and ridiculous in the extreme.

V.

Woodmar Realty Company lists under Item 4 of the "Questions Presented for Review", the following:

> "Whether or not the Court of Appeals erred in approving the allowance of trustee's fees and trustee's attorney's fees in amounts approximating $130,000.00."

The record shows that the trustee's petition for the allowance of fees and expenses and the petition of trustee's counsel for fees and expenses were presented in the District Court at a creditor's meeting. The allowance of such petitions under the law were addressed to the sound discretion of the District Court judge. This judge's rulings on such petitions are in the record in the opinion of the District Court as set out in Appendix "C" at page 15-a and attached to this petition.

The discussion of fees and expenses is found particularly at pages 25-a to 29-a, inclusive. The Court of Appeals likewise approved the amount of such allowance.

The long pendency of this proceeding, the fact that the trustee and his attorney have carried this proceedings without any payment since 1953,—the further fact that there have been nine appeals from the District Court to the Court of Appeals,—several petitions for rehearing,—and now three petitions for certiorari to this court,—together with the substantial sums involved,—were all taken into consideration by the District Court judge in the making of such allowances.

As heretofore alleged, the matter of allowances is a matter addressed to the sound discretion of the trial court judge. In this instance, the allowances and the amount thereof do not constitute a proper reason for the consideration of a petition for a writ of certiorari.

VI.

The Decision of the Court of Appeals Is Clearly Correct.

As has been previously pointed out, this bankruptcy matter has been pending in the United States District Court for the Northern District of Indiana since January 1941.

The effect of the judgment of the Court of Appeals was to permit the winding up of this long pending matter.

The indebtedness as is set out herein is in the form of unpaid special improvement bonds—representing liens on the bankrupt's real estate. The closing of the bankruptcy will permit some payment on these bonds after 26 years of litigation.

As has been pointed out—since 1955 there have been nine appeals to the Court of Appeals from the District Court, all of them taken by the bankrupt.

There have been two prior petitions for certiorari by Woodmar Realty Company. This bankrupt has certainly had its day in court.

In the District Court opinion of January 19, 1967—the District Court characterized the conduct of Woodmar Realty Company, the bankrupt, in pressing its objections, as follows:

> "We suggest that counsel for the bankrupt read our opinions and that of the Court of Appeals regarding Claim 441—and our opinions of May 20, 1963—September 23, 1963, and April 28, 1963, dealing with the remaining lien claims, which opinions are incorporated herein by reference. Those opinions and the entire record herein establish conclusively the lack of merit in the bankrupt's objections. The raising of such objections at this stage of the proceedings can only be considered as harassment of the trustee and parties in interest and is an insult and affront to the court."

This portion of the District Court's opinion is found at Appendix "C", page 21-a attached to this petition.

CONCLUSION.

The petition for review wholly fails to show any cause whatsoever why the action of the Court of Appeals in this matter should be reviewed.

The questions presented in such appeal were simple problems arising in the administration of a bankruptcy estate.

No established precedent was violated by the decision of the Court of Appeals. It clearly appears that in this litigation there is no important legal question of federal law requiring decision by this court. No conflict is pointed out in the decision of the Court of Appeals in this matter—with cases decided in other courts of appeals or in the opinions of this court.

WHEREFORE, for the reasons heretofore set out, the Respondent respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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